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In the Supreme Court of the United States

OCTOBER TERM, 1993

LEROY MOSS

Respondent

VERSUS

DIXIE MACHINE, WELDING AND METAL WORKS, ET AL

Petitioners

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA

PETITION FOR WRIT OF CERTIORARI

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37 pp

QUESTION PRESENTED FOR REVIEW

Whether the exclusivity provisions of the Longshore and Harbor Workers Compensation Act, 33 USCA 901 *et seq.*, when read in conjunction with the exclusivity provisions of the Louisiana Workers Compensation Act, La. R.S. 23:1021, *et seq.*, precludes an employee covered under the Longshore and Harbor Workers Compensation Act from seeking tort damages in State court for those injuries which are covered under the Federal Act.

LIST OF PARTIES

Plaintiff - Respondent

Leroy Moss

Defendant - Petitioner

Dixie Machine, Welding and Metal Works

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The Judgment of the Civil District Court for the Parish of Orleans denying Respondent's Declinatory Exception of Jurisdiction improperly styled, "Declinatory Exception of Prescription," will not be reported. The Judgment of the Fourth Circuit Court of Appeal, State of Louisiana, granting Writs and affirming the Civil District Court decision is reported at 617 So.2d 959 (4th Cir. 1993). The Judgment of the Supreme Court of Louisiana, denying Respondent's Writ Application is reported at 620 So.2d 845 (La. 1993). Copies of these Judgments are contained in the Appendix.

JURISDICTION

The Judgment of the Supreme Court of Louisiana, denying Respondent's Writ, was entered on June 25, 1993. The jurisdiction of this Court is invoked pursuant to 28 USC §1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This Petition involves the preemptive nature of the Longshore and Harbor Workers Compensation Act with respect to the Louisiana Workers Compensation Act, and the supremacy clause of the United States Constitution. The Longshore and Harbor Workers Compensation Act, §905(a) provides as follows:

> The liability of an employer prescribed in §904 of this Title shall be exclusive and in place of all other liability of such employer to

> the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or an admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this Chapter, an injured employee of his legal representative in case death results from the injury, may elect to claim compensation under the Chapter, or to maintain an action in law or in admiralty for damages on account of such injury or death.

Section 1035.2 of the Louisiana Workers Compensation Act (La. R.S. 23:1021, *et seq.*) provides:

> No compensation shall be payable in respect to the disability or death of any employee covered by the Federal Employees Liability Act, the Longshore and Harbor Workers Compensation Act, or any of its extensions, or the Jones Act.

Article 6, Clause 2 of the Constitution of the United States provides:

> This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding.

— STATEMENT OF THE CASE

This matter centers on an accident which occurred on May 19, 1992. Respondent, Leroy Moss, an employee of Dixie Machine, Welding and Metals Works (hereinafter "Dixie") was working as a welder/fitter on board a Lykes Brothers steamship, which was docked at the Andrews Street wharf in New Orleans. Moss contends that on May 19, a co-employee named "Major" began arguing with Respondent, and pulled a knife, threatening to kill Moss. Moss allegedly reported this incident to his foreman, "Tony" who, it is claimed, failed to do anything to prevent Major from threatening Moss. Upon returning to work, Major again attacked Moss, again wielding a knife. Moss attempted to avoid Major's advances, and in doing so, slipped and fell on a large metal object on the ship, which is used to tie it up. Moss claims to have sustained injuries as a result of the accident. Additionally, as a result of the altercation, both Moss and his co-employee, Major, were released from employment with Dixie.

Moss filed a claim for compensation with the U.S. Department of Labor on June 10, 1992, seeking compensation pursuant to the Longshore and Harbor Workers Compensation Act (LHWCA). On September 30, 1992, Moss instituted suit in the Civil District Court for the Parish of Orleans, naming as defendants his employer, Dixie; Tony, Major, and "Eli", Respondent's supervisor. Moss sought damages for the injuries he alleges were the result of the intentional acts of the individual defendants for whom Dixie is vicariously liable. Additionally, Moss sought damages from Dixie for its alleged failure to maintain a safe work site and for wrongful termination and/or retaliatory

discharge.

Petitioner, Dixie, was served with a Petition, and filed an Answer and Declinatory Exception of Lack of Subject Matter Jurisdiction. It was Dixie's position that as plaintiff's injuries and claims were all covered under the LHWCA, and Section 1035.2 of the Louisiana Worker's Compensation Act (La.R.S. 23:1021 *et. seq.*, hereinafter "LWCA") relinquishes jurisdiction in such cases, the exclusiveness of the Federal remedy precluded plaintiff from seeking tort damages in state court for those injuries and claims. After a hearing on the merits, Dixie's motion was denied. Dixie subsequently filed an application for supervisory writs with the Fourth Circuit Court of Appeal, State of Louisiana, seeking a review of the trial court's denial of lack of subject matter jurisdiction.

In a decision rendered April 15, 1993, the Fourth Circuit Court of Appeal exercised its supervisory jurisdiction and granted Dixie's writ application. A Judgment was rendered in favor of Moss, finding that Dixie's argument lacked merit, and determining that a Louisiana court has concurrent jurisdiction with the federal courts to hear matters which may fall under the LHWCA. Dixie then applied for writs with the Supreme Court of Louisiana to review the decision of the Fourth Circuit Court of Appeal. The Supreme Court denied the writ application on June 25, 1993.

ARGUMENT

A. BY VIRTUE OF THE EXPRESS LANGUAGE OF LA.R.S. 23:1035.2, LOUISIANA STATE COURTS DO NOT HAVE CONCURRENT JURISDICTION TO HEAR MATTERS WHICH ARE ALSO COVERED UNDER THE LONGSHORE AND HARBOR WORKERS COMPENSATION ACT.

Section 905 of the Longshore and Harbor Worker's Compensation Act provides in pertinent part:

> The liability of an employer prescribed in §904 of this Title shall be exclusive and in place of all other liability of such employer to the employee, ... except that if an employer fails to secure payment of compensation as required by this chapter, an injured employee, ... may elect to claim compensation under the chapter, or maintain an action at law, or in admiralty, for damages on account of such injury or death.

Whether this provision incorporates preemptive qualities with respect to state compensation schemes has long been the subject of debate before this court.

In 1917, with the decision of *Southern Pacific Company v. Jensen*, 244 U.S. 205, 37 S.Ct. 524, 61 L.Ed. 1086, the U. S. Supreme Court held that states could not constitutionally apply their worker's compensation provision to maritime injuries. The "*Jensen* line" was thus created,

which line was formed "by the edge of a navigable waterway beyond which state compensation laws could not pass." *Logan v. Louisiana Dry Dock Co., Inc.*, 541 So.2d 182 (La. 1989) (f.n. 8). The LHWCA, later enacted by Congress in 1927, provided a federal remedy for maritime workers who, by the holding of *Jensen*, were precluded from recovering under state law. The effect of the Longshore Act was to create two mutually exclusive remedies for individuals who worked on or near navigable waters, but the spheres of jurisdiction were not clearly defined.

This scenario changed somewhat with the Supreme Court's decision in *Davis v. Department of Labor and Industries of Washington*, 317 U.S. 249, 63 S.Ct. 225 (1942), which stated that the Longshore Act covered harbor workers and longshoremen who were injured on navigable waters. However, these same employees also had the option to seek compensation which was provided by state law. The court found that some "employees such as decedent here occupied that shadowy area within which, at some undefined and undefinable point, state laws can vilidly provide compensation." 63 S.Ct. at 227. In such circumstances, either the state or federal court, to which the claimant applied for relief could assume it had jurisdiction, absent evidence to the contrary.

In 1962, the opinion of *Calbeck v. Travelers Insurance Company*, 370 U.S. 114, 82 S.Ct. 1196 (1962), held that there was concurrent jurisdiction over injuries which occurred on the water's edge, so that an employee injured on navigable waters could be compensated under either the Longshore Act or a state compensation scheme.

In 1972, Congress adopted several amendments to the Longshore Act. One of the effects of these amendments was that the protection of the LHWCA was extended to include maritime workers shoreward of the water's edge. Shortly after the Longshore Act was amended, in *Sun Ship, Inc. v. Pennsylvania*, 447 U.S. 715, 100 S.Ct. 2432, 65 L.Ed. 2d 458, (1980), the Supreme Court was asked to decide if workers who were covered employees under the LHWCA were preempted by virtue of that Federal Act from seeking state compensation benefits. In holding that a state may apply its compensation scheme under the circumstances where the LHWCA also applied, the Supreme Court recognized that situations would arise wherein an employee would fall into the "twilight zone" of coverage. Where an employee was covered by both state and federal compensation schemes, an employee could choose which scheme he wished to pursue, and jurisdiction would be concurrent. The Supreme Court found no intent on the part of Congress, in passing the amendments to the Longshore Act, to preempt state remedies to a worker also covered by the LHWCA. Therefore, "federal jurisdiction would coexist with state compensation laws in that field in which the latter may constitutionally operate under the *Jensen* doctrine." 100 S.Ct. at 2438, 447 U.S. at 722.

The Louisiana Supreme Court, adhering to the U.S. Supreme Court decision of *Sun Ship*, readily applied the theory of concurrent jurisdiction in *Beverly v. Action Marine Services, Inc.*, 433 So.2d 139 (La. 1983), and again in *Logan, supra*. In *Beverly*, a deceased employee was a land-based worker who satisfied both the status and situs tests for coverage under the LHWCA. However, *Beverly's* parents were not allowed to seek remedy pursuant to the

Longshore Act, as they were not "dependents" as defined by that Act. The state compensation scheme, however, allowed parents to recover $20,000 each, as long as the deceased left no dependents. In finding that the parents were allowed to recover under the state scheme, the Louisiana Supreme Court determined that even if a worker meets the status and situs requirements under the Longshore Act, "status for purposes of federal coverage does not bar recovery under the state law." 433 So.2d at 142, citing, *Hahn v. Ross Island Sand and Gravel Company,* 358 U.S. 272, 79 S.Ct. 266, 3 L.Ed. 2d 292 (1959). As the Louisiana Compensation Act gave the parents a remedy not provided under the LHWCA, the state remedy could be sought in preference to the federal benefits. Therefore, the state court allowed state workers' compensation coverage in that decision.

In *Logan,* the plaintiff was a welder who was injured while repairing a barge located on dry docks on the Mississippi River. Although the plaintiff met both the status and situs requirements for coverage under the LHWCA, he chose to pursue compensation under the state compensation scheme. The trial court found that the plaintiff could receive state compensation benefits, however the appellate court reversed that decision. Relying on *Sun Ship,* the Louisiana Supreme Court determined that the Longshore Act did not preempt the application of state compensation remedies. The court found, "[T]he state and federal remedies are complimentary. Concurrent jurisdiction does no harm to the remedial purposes of the LHWCA." 541 So.2d at 185. Therefore, the Supreme Court found that Louisiana was able to exercise jurisdiction over the plaintiff's claim.

In 1989, however, the Louisiana Legislature passed Act No. 454, which added a section to the Louisiana Workers' Compensation Act (LWCA) which greatly alters the interpretation Louisiana courts should give to *Sun Ship* and it progeny. By virtue of Act 454, the LWCA was amended to provide an additional section, 1035.2, which reads as follows:

> No compensation shall be payable in respect to the disability or death of any employee *covered by* the Federal Employers Liability Act, *Longshoremen and Harbor Workers Compensation Act,* or any of its extensions, or the Jones Act. (Emphasis added).

This amendment was the result of the Louisiana Legislature's apparent dissatisfaction with the uncertain nature of recovery for workers who fell under the "twilight zone" of coverage pursuant to the LHWCA and the LWCA. "The plain language of this section indicates a Legislative intent to disallow concurrent jurisdiction, and thereby overrules *Beverly* and *Logan* insofar as those opinions sanctioned concurrent coverage by the LHWCA and the Louisiana Workers' Compensation." Piglia, *The 1989 Amendments to Louisiana Workers' Compensation Act: The Legislature's Attempt to Reinstate - or Retip - the Careful Balance of Interest Upset By Judicial Interpretation.* 36 Loy. L. R. 158, 189 (1992).

The passage of this amendment clearly evidences the intent of the Louisiana Legislature to defer all issues covered under both the Longshore Act and the Louisiana State Compensation Act to the LHWCA. Specific atten-

tion should be paid to the language which reads, "covered by", within Section 1035.2. As long as the injury for which the plaintiff seeks compensation is covered by the Longshore Act, then the State relinquishes its jurisdiction over those claims to the federal forum.

Since the passage of La. R.S. 23:1035.2, a paucity of cases has been handed down interpreting this statute. In fact, aside from the appellate decision in the instant case, only three appellate court decisions have even mentioned this provision. In *Jackson v. American Mutual Liability Insurance Company,* 584 So.2d 348 (La. App. 3rd Cir. 1991), *writ den.,* 589 So.2d 1075, the sole question before the Third Circuit was whether a worker had elected remedy under the LHWCA, thus precluding him from pursuing a remedy under the Louisiana Workers' Compensation Act. The pertinent provision of the Louisiana Compensation Act was Section 1225(D), which provided that no compensation would be paid pursuant to the state compensation scheme if the employee received a favorable final adjudication pursuant to a federally enacted worker's compensation scheme. The plaintiff, Jackson, was denied federal relief pursuant to the LHWCA before filing for state relief. In noting that the denial of the federal benefits would not be considered favorable for purposes of acting as a bar to Louisiana compensation, the court noted, "that under La. R.S. 23:1035.2, effective January 1, 1990, there would be no issue as to whether a plaintiff could proceed under state compensation law when covered by the LHWCA." 584 So.2d 352, f.n. 8.

In *Brown v. Avondale Industries, Inc.,* 612 So.2d 315 (La. App. 5th Cir. 1993), an employee was receiving

benefits pursuant to the LHWCA, and at the same time filed a tort action against its statutory employer, Avondale. Avondale filed for summary judgment claiming that Brown's exclusive remedy was under the federal statute. The trial court granted the summary judgment, which was affirmed by the Fifth Circuit. Although the Fifth Circuit was aware of the recent passage of La. R.S. 23:1035.2, its decision was based on previous case law which held "plaintiffs cannot be allowed to seek remedies under state law and, at the same time... deny defendants the right to raise state law defenses." The Fifth Circuit found that this holding would remain controlling until changed by the Supreme Court of Louisiana. The Supreme Court later overturned the Fifth Circuit's affirmation of the trial court's finding. (617 So.2d 482). However, the Louisiana Supreme Court never addressesd the issue of La.R.S. 23:1035.2. It should be noted that this would have been a moot issue, as Brown's injury occurred on April 6, 1989, eight months prior to the effective date of the provision .

Finally, in *Smith v. Gretna Machine and Iron Works,* 617 So.2d 144 (La. App. 5th Cir. 1993), the Fifth Circuit was faced with the question of whether it was proper for the trail court to grant an exception of lack of subject matter jurisdiction, based on La. R.S. 23:1035.2. The plaintiff in *Smith* was employed as a sandblaster for 13 years, and was diagnosed with silicosis in 1991. He sought state workers' compensation relief, to which his employer filed an Exception of Lack of Subject Matter Jurisdiction, claiming that the Longshore Act provided his sole relief, according to the language of La. R.S. 23:1035.2. Although the basis of the lack of subject matter juirisdiction is the same as in the case at bar, the question presented to the

Fifth Circuit was whether there was enough factual evidence on the face of the petition to justify the granting of the exception. As the plaintiff suffered from a progressive occupational disease, the question arose whether La. R.S. 23:1035.2 was applicable, as its effective date was January 1, 1990. The appellate court found that the defendant did not provide enough evidence within the text of the exception, to justify the granting of the exception, therefore, the matter was remanded for further proceedings.

The state court petition filed by plaintiff alleges various causes of action against Dixie. Plaintiff asserts that Dixie is vicariously liable for the acts of its employees, Major and Tony; that Dixie is liable for failure to maintain a safe work site; and that Dixie is liable for damages resulting from the wrongful discharge of plaintiff. Under the LHWCA, the term "injury" is defined as "an accidental injury or death arising out of and in the course of employment; ... and includes an injury CAUSED BY THE WILLFUL ACT OF A THIRD PERSON directed against an employee because of his employment." 33 USCA 902(2). (Emphasis added); The courts, in interpreting this language, have determined that even such actions as a busboy killing a cook with a meat cleaver are covered under the statute. *Maryland Casualty Company v. Cardillo,* 99 F.2d 432 (D.Col. App. 1938).

Plaintiff alleges that Major "consciously desired and intended the physical result of his actions...and knew that injury to plaintiff was substantially certain to follow from his conduct." As the actions of Major constituted "willful acts of a third person", these actions are covered under the LHWCA, and are therefore compensable under the federal

scheme. —

Plaintiff also seeks redress for the alleged retaliatory discharge by Dixie. Section 948(A) of the Longshore Act provides in pertinent part:

> It shall be unlawful for any employer or his duly authorized agent to discharge or in any other manner discriminate against an employee as to his employment because such employee has claimed or attempted to claim compensation from such employer.

Plaintiff furthermore alleges that Dixie is liable for its failure to provide a safe work place. The necessity of providing a safe work place is established under 33 USC 941(A), which reads:

> Every employer shall furnish and maintain employment in places of employment which shall be reasonably safe for employees.

By comparing the allegations contained within plaintiff's Petition, with the provisions set forth by the LHWCA, it becomes clear that *all* remedies for plaintiff's contentions are covered under the federal act. As the injuries allegedly suffered by Moss are covered under the LHWCA, by the express language of La. R.S. 23:1035.2, jurisdiction over this matter is relinquished to the federal forum, therefore, Louisiana state courts have *no* jurisdiction to hear the claim.

B. THE LONGSHORE AND HARBOR WORKERS COMPENSATION ACT PREEMPTS THE APPLICATION OF THE LOUISIANA WORKER'S COMPENSATION ACT.

Should this Court find that the language of La. R.S. 23:1035.2 does not relinquish jurisdiction to the federal forum, Dixie respectfully urges that because the compensation schemes provided under the Longshore Act and the State Act are not complimentary, the Longshore Act preempts the application of the State Act.

As mentioned above, Moss asserts three causes of action in his petition; first, that Dixie is vicariously liable for the acts of its employees, Major and Tony; that Dixie failed to maintain a safe work site; and that Dixie is liable for damages resulting from the wrongful discharge of plaintiff. As previously noted, redress for all of these allegations are provided for under the LHWCA. According to the provisions of the LWCA, an action for an intentional tort by a third party on an employee is not included in the definition of injury for purposes of compensation, nor does such an action give rise to a claim against an employer for compensation. La. R.S. 23:1021; La. R.S. 23:1031(C)(D). Recourse for such an occurrence must be pursued through state court action. Despite the inclusion of retaliatory discharge language in La. R.S. 23:1361, the Louisiana Supreme Court, in the case of *Sampson v. Wendy's Management, Inc.*, 593 So.2d 336 (La. 1992), held that a claim for retaliatory discharge is tortious in nature, and not a worker's compensation matter. Therefore, a claim for such an action may be properly brought in district court.

Again, the LHWCA provides an avenue by which plaintiff may seek redress for his alleged retaliatory discharge; the LWCA does not.

Section 1031 of the Louisiana Act places liability on an employer for employee accidents which arise out of an in the course of his employment. The focus of this section is the relationship of the risk of injury to the nature of employment. Thus, accidents which are attributable to the employment risks are covered under this section.

Dixie urges that these glaring differences in relief provided for under the federal and state compensation schemes, no longer uphold jurisdiction. In fact, it is clearly seen that the two acts are not complimentary, rather contradictory. The only complimentary provision includes the requirement of providing a safe work place.

Dixie is fully aware that the Supreme Court in *Sun Ship,* indicates that the LHWCA does not preempt the state compensation law where the two compensation schemes are complimentary. Indeed, the Supreme Court has cautioned lower courts not to strike down state regulation in admiralty. "Even though Congress has acted in the admiralty area, state regulation is permissible absent a clear conflict with the federal law." *Askew v. American Waterways Operators, Inc.,* 411 U.S. 325, 341; 93 S.Ct. 1590, 1600; 36 L.Ed. 2d 280, (1973). Federal peremption of state statutes falls under the supremacy clause of the federal Constitution. To the extent that a conflict exists between the state and federal regulation, the latter must prevail. *Pennsylvania Rail Company v. Illinois Brick Company,* 297 U.S. 447, 56 S.Ct. 556, 80 L.Ed. 796 (1936).

Clearly, a conflict between the LHWCA and the LWCA exists, therefore, federal law preempts state law in this matter.

Notwithstanding the language and effect of La.R.S. 23:1035.2, Dixie is aware that if plaintiff had chosen to pursue compensation under the Louisiana Workers Compensation Act first, he would not be precluded from later seeking recovery under the Longshore Act. Furthermore, plaintiff's recovery under the Longshore Act does not preclude him from later seeking compensation under the state Act, as long as there is no double recovery. *Calbeck, supra.* However, Dixie contends that as plaintiff sought remedy under the Longshore Act, he is precluded from seeking a state tort claim for the same injuries he claims under the federal Act. In *Pope and Talbot, Inc. v. Hahn*, 346 U.S. 406, 74 S.Ct. 202, 98 L.Ed. 143(1953), the U.S. Supreme Court recognized that states may, at times, supplement federal maritime policies, however, "a state may not deprive a person of any substantive admiralty rights as defined in controlling acts of Congress, or by interpretive decisions of this Court." As §905 was intended to grant an employer immunity from federal negligence liability, allowing plaintiff to proceed against the same employer in state court under the therory of negligence liability will deprive Dixie of a Federally guaranteed right.

An analogy to this situation can be drawn to *Peter v. Hess Oil Virgin Islands Corp.*, 903 F.2d 935 (3rd Cir. 1990). In *Peter*, an employee brought a negligence action against Hess, alleging that the oil refinery did not take the proper safety precautions necessary to protect the employee from exposure to jet fuel. The question presented to the court

was whether allowing the employee tort recovery under Virgin Islands law conflicted with the LHWCA, which provided an exclusive remedy. The defendant argued that the plaintiff was a borrowed servant, therefore, Hess was entitled to the immunity afforded by the Longshore Act. As 905(A) was the exclusive source of relief for injured employee who fell under the LHWCA, Hess urged that the employee should be precluded from proceeding in a state tort action.

A month before the plaintiff's accident, the Virgin Islands Legislature amended the Island's compensation act, eliminating the borrowed servant defense to compensation claims. While the court recognized that the abrogation of the defense was effective toward the Island's compensation statute, such abrogation had no effect upon the LHWCA. Therefore, Hess could implement the borrowed servant defense, and the exclusive remedy afforded by the LHWCA pursuant to §905, precluded a claim in tort.

In the case at bar, Moss filed a claim under the LHWCA for the injuries brought about by the actions of his co-employee, and for his retaliatory discharge. Both of these causes of action are recognized under the federal statute. In exchange for providing relief for these actions, the federal act provides limited liability for the employer accused of such actions. By allowing the plaintiff to proceed in a state court claim against the employer for the same actions, Dixie is stripped of the limited liability provided under the federal act, and exposed to further liability through the state claim.

This is directly opposed to the quid pro quo the

Supreme Court has long considered the LHWCA to embrace. The Supreme Court has opined:

> The Act is not a simple remedial statute intended for the benefit of the workers. Rather, it was designed to strike a balance between the concerns of the longshoremen and harbor workers on the one hand, and the employers on the other. Employers relinquish their defenses to tort actions in exchange for limited and predictable liability. Employees accept the limited recovery because they receive prompt relief without the expense, uncertainty, and delay that tort actions entail. *Morrison-Knudsen Construction Company v. Director, of WCP,* 461 U.S. 624, 103 S. Ct. 2045, 76 L.Ed. 2d 194 (1983).

It is clear that the very language of §905(A) embodied the intent of Congress to provide immunity to an employer from federal negligence liability and from state liability as well. By requiring employers to relinquish their defenses to tort actions, Dixie contends that the LHWCA meant for compensation to be a workers primary relief, not tort damages.

In addition to providing workers quick relief, the LHWCA was also intended to provide uniform treatment for workers who fell under its provisions. The very uniformity the LHWCA established would be thwarted by allowing plaintiff to proceed in a state tort action to recover damages for injuries for which he is also seeking federal compensation. Such a scenario would allow an employee who is injured on the dock site, and covered under both the LWCA and the LHWCA, to proceed in tort against his

employer, in addition to receiving compensation benefits; whereas that same employee, if injured three miles from shore, would be limited solely compensation under the LHWCA. Surely this arrangement does not promote the uniformity and relief, and surely this was the situation which Congress intended to avoid when implementing §905. Simply put, a plaintiff should not be able to have his compensation and tort damages too.

CONCLUSION

Leroy Moss was a covered employee under the LHWCA. As such, he filed a claim for benefits for his injuries under that Act. It is clear that redress for all of plaintiffs allegations are provided for under the Federal Act. The plain language of both the Longshore and Harbor Workers Compensation Act, and the Louisiana Workers Compensation Act clearly establishes the exclusivity of the Longshore Act. By the passage of Act 454, in 1989, the Louisiana Legislature specifically chose to relinquish concurrent jurisdiction over those matters which were also covered by the Longshore Act. Dixie urges that, pursuant to La. R.S. 23:1035.2, plaintiff is precluded from proceeding in state district court to recover for those injuries which are covered under the LHWCA.

Unlike the Longshore Act, the Louisiana Workers' Compensation Act does not afford remedies to an employeee for retaliatory discharge or the intentional torts of a third party. These claims must be pursued through state court action. These differences in relief between the two acts are not reconcilable, therefore, concurrent jurisdiction no longer exists. As the two acts are at

odds in the relief provided, the Longshore Act preempts the State court jurisdiction.

Section 905 of the LHWCA provides that the liability of the employer by virtue of the provisions of the LHWCA is exclusive. This embodies a compromise between employers and employees, wherein the employer relinquishes its defense to tort actions in exchange for limited and predictable liability, and the employee accepts limited recovery and prompt relief for injuries. Plaintiff's recovery of benefits under the Longshore Act enables Dixie to avail itself of the guaranteed right to limited liability as provided for under the LHWCA. This limited liability precludes plaintiff from proceeding in a state tort action to recover for the same damages plaintiff seeks to recover under the Federal Act. By allowing plaintiff to proceed in the state tort action, plaintiff would be allowed to usurp the limited liability established under the LHWCA.

Therefore, Dixie respectfully requests that this Court should grant the present application and determine that the Exception for Lack of Subject Matter Jurisdiction, pleaded by Dixie Machine, has merit, and that his Honorable Court find that plaintiff's sole remedy lies with the Longshore and Harbor Worker's Compensation Act.

Respectfully submitted,

BLUE WILLIAMS, L.L.P

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APPENDIX A

CIVIL DISTRICT COURT
FOR THE PARISH OF ORLEANS
STATE OF LOUISIANA

DIVISION "A"

NO.: 92-16802 IN FORMA PAUPERIS

LEROY MOSS

VERSUS

DIXIE MACHINE, WELDING, AND
METAL WORKS, INC., ET AL

AMENDED ORDER

This cause came on this day for trial on the defendant's exception for lack of subject matter jurisdiction.

Present: David S. Scalia of Schoemann & Associates, Attorneys for plaintiff.

Richard S. Vale of Blue, Williams & Buckley, Attorneys for defendant.

This Order amends the previous Judgment filed in this case that was inadvertantly styled as a Judgment denying defendant's Motion for Summary Judgment, rather than an Order denying the defendant's Exception for Lack of Subject Matter Jurisdiction.

When, after hearing the pleadings, evidence, and arguments of counsel, the Court considering the law and the evidence to be in favor of the plaintiff for the reasons orally assigned;

IT IS ORDERED, ADJUDGED, AND DECREED that there be a judgment herein in favor of the plaintiff, Leroy Moss, and against the defendant mover, Dixie Machine, Welding, and Metal Works, Inc. et al, denying and dismissing the exception filed by the defendant, with costs.

JUDGMENT read and rendered in open Court December 18, 1992

JUDGMENT read and signed in open Court January 20, 1993.

A TRUE COPY

/s/ Todd Lacoste
DEPUTY CLERK
CIVIL DISTRICT COURT
PARISH OF ORLEANS
STATE OF LA.

/s/ Thomas A. Early, Jr.
J U D G E

APPENDIX B

LEROY MOSS	NO. 93-C-0407
VERSUS	COURT OF APPEAL
DIXIE MACHINE, WELDING AND METAL WORKS, INC. ET AL	FOURTH CIRCUIT STATE OF LOUISIANA

APR 16, 1993

ON SUPERVISORY WRITS FROM THE
CIVIL DISTRICT COURT, FOR THE
PARISH OF ORLEANS
NO. 92-16802, DIVISION "A"
HONORABLE THOMAS A. EARLY, JR., JUDGE

* * * * * * * *

WILLIAM H. BYRNES, III
JUDGE

* * * * * * * *

(Court composed of Judge Robert J. Klees, Judge William H. Byrnes, III and Judge Robert L. Lobrano)

RICHARD S. VALE
Blue, Williams & Buckley
Metairie, Louisiana
Attorney for Relator

DAVID S. SCALIA
Schoemann & Associates
New Orleans, Louisiana
Attorney for Respondent

AFFIRMED

APR 15 1993

We grant supervisory writs on the application of Dixie, Welding Machine and Metal Works, Inc., to review the trial court's denial of relator's exception of lack of subject matter jurisdiction.

This litigation arises from an accident which occurred on May 19, 1992. The plaintiff/respondent, Leroy Moss, was working as a welder/fitter on board a Lykes Brothers ship at the Andrews Street Wharf in New Orleans. Moss alleges that a co-employee, "Major", began an argument, pulled a knife, and threatened to kill him. Moss reported the incident to the foreman, "Tony", who did nothing to protect Moss or terminate Major. When Moss returned to work, Major again attacked him. Moss slipped and fell while trying to avoid the attack and was injured by his fall onto a large metal object on the ship which is used to tie it up. Moss filed a "Petition For Intentional Tort" in state court alleging that he reported the incident and his injuries to the superintendent, "Eli", who shortly thereafter fired the plaintiff.

In that petition, Moss named as the defendants, "Major", the foreman "Tony", the superintendent "Eli", and the common employer of all the men, Dixie Machine, Welding and Metal Works Inc., the relator (hereinafter *dismissed* 429 U.S. 939, 110 S.Ct. 30.[1] See also *Green v. Industrial Helicopters, Inc.*, 593 So.2d 634 (La. 1992), *cert. den.* ____ U.S. ____, 113 S.Ct. 65.

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[1] The relator conceded in its exception of no jurisdiction that the plaintiff falls within the scope of both the Louisiana Compensation Act and the LHWCA, i.e., the "twilight zone" of concurrent jurisdiction.

A second consideration in this matter is that the two claims asserted by the plaintiff, intentional tort and wrongful or retaliatory discharge, are actually not worker's compensation claims under Louisiana law. La. R.S. 23:1032 specifically provides that liability for intentional acts is not governed by the Louisiana Worker's Compensation Law. As to the retaliatory discharge claim, the Louisiana Supreme Court recently held in *Sampson v. Wendy's Management, Inc.*, 593 So.2d 336, 338 (La. 1992) that "the cause of action created by LSA-R.S. 23:1361 constitutes a delictual employment law matter, as a statutory exception to employment at will, rather than a worker's compensation matter." The district court is a proper forum to hear such a claim.

LSA-R.S. 23:1035.2 bars recovery under the Louisiana Worker's Compensation Law only if the claim is also covered under the LHWCA. Claims for wrongful discharge or intentional tort are not worker's compensation claims. They are not barred by LSA-R.S. 23:1035.2. Furthermore, it has been held that the wrongful discharge remedy provided under the LHWCA, §948(a), does not preempt a similar state remedy and cause of action. *Wallace v. Ryan-Walsh Stevedoring Co., Inc.*, 708 F.Supp. 144 (E.D.Tex. 1989).

With the exception of paragraphs X, XV, XVI, and XVIII the first eighteen paragraphs of plaintiff's petition contain allegations sufficient to state intentional tort claims which would not be covered by the worker's compensation act. *Adams v. Time Saver Stores, Inc.*, No. 92-C-1339 (La. App. 4 Cir., Feb 26, 1993); *Williams v. Gervais F. Favrot Co. Inc.*, 573 So.2d 533 (La. App. 4 Cir. 19991);

Robertson v. La Place Concrete, Inc., 560 So.2d 561 (La. App. 5 Cir. 1990).

We find no merit in Dixie's exception. The ruling of the trial court is affirmed.

AFFIRMED

APPENDIX C

THE SUPREME COURT OF THE
STATE OF LOUISIANA

JUNE 20 1993

LEROY MOSS

VS. NO. 93-CC- 1283

DIXIE MACHINE, WELDING
AND METAL WORKS, INC. ET AL

- - - - - -

IN RE: Dixie Machine Welding/Mtl. Wks.; - Defendant(s); Applying for Writ of Certiorari and/or Review, Supervisory and/or Remedial Writs; to the Court of Appeal, Fourth Circuit, Number 93CW-0407; Parish of Orleans Civil District Court Div. "A" Number 92-16802

- - - - - -

June 25, 1993

Denied.

HTL

PFC

WFM

JCW

PH

CDK

ROO

DENNIS, J., not on panel.

Supreme Court of Louisiana

June 25, 1993

/s/ Illegible

Clerk of Court
For the Court